No. 02-1028

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY PTY LIMITED D/B/A KIRBY ENGINEERING AND ALLIANZ AUSTRALIA LIMITED,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF PROFESSORS FRANCESCO BERLINGIERI (ITALY), PHILIPPE DELEBECQUE (FRANCE), SARAH DERRINGTON (AUSTRALIA), RALPH B.T. DE WIT (BELGIUM), TOMOTAKA FUJITA (JAPAN), HANNU HONKA (FINLAND), IN HYEON KIM (KOREA), DAVID MORÁN BOVIO (SPAIN), PAUL MYBURGH (NEW ZEALAND), FRANCIS M.B. REYNOLDS (ENGLAND), JOHAN SCHELIN (SWEDEN), AND GERTJAN VAN DER ZIEL (THE NETHERLANDS) AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENTS

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QUESTION PRESENTED

This brief responds to the first question presented in the Petition for a Writ of Certiorari:

> Whether a cargo owner that contracts with a freight forwarder for transportation of goods to a destination in the United States is bound by the contracts that the freight forwarder makes with carriers to provide that transportation.

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors from twelve major commercial maritime nations who are expert in the law of international goods transport. They currently teach, or have spent their professional careers teaching, maritime law and related subjects at the leading law schools in their home countries and, as visiting professors, at law schools around the world. They have written about the subject extensively, and their works include some of the principal treatises on the matters at issue in this case. They have been recognized by their governments as authorities who are well-suited, both by their interests and by their expertise, to work in international fora to achieve greater uniformity in goods transport law.

Several *amici* have served on the Legal Committee of the International Maritime Organization (IMO), the permanent international body established under U.N. auspices in 1948 to promote maritime safety and the prevention of marine pollution.

Several *amici* have represented their national maritime law associations in the Comité Maritime International (CMI), a private non-governmental organization established in 1897 "to contribute by all appropriate means and activities to the unification of maritime law in all its aspects." CMI Constitution, art. 1. More specifically, these *amici* have served on the International Sub-Committee on Uniformity of the Law of Carriage of Goods by Sea, which met from 1995 to 1998, or on the International Sub-Committee on Issues of Transport Law, which has met since 2000, or on both. The current Transport Law Sub-Committee was established in response to an invitation from the United Nations Commission on International

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[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than the University of Richmond School of Law, which paid for the printing of this brief through Professor Jones's research account, made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of the parties, reflected in letters on file with the Clerk.

Trade Law (UNCITRAL) asking the CMI to undertake the preparatory work for a new international convention governing the carriage of goods by sea. In December 2001, the CMI submitted its proposed Draft Instrument to UNCITRAL.[2] *See* 2001 CMI Yearbook 532.

Most of the *amici* now serve on UNCITRAL's Working Group III (Transport Law), which has been meeting since the spring of 2002 to negotiate a new international convention governing the carriage of goods by sea (including multimodal shipments that include sea carriage). The Working Group's most recent session occurred earlier this month. As the Solicitor General notes, the United States is "an active participant" in this process. U.S. Brief at 2 n.1. Among the matters under discussion are the freedom of contract, the obligations of a carrier, and the rights and obligations of performing parties.

All twelve *amici* have participated in the current international process, either through the CMI or as members of the UNCITRAL Working Group; several have been active in both. The enhancement and unification of goods transport law world-wide is thus an avocation and a mission for *amici*. They regard the integration of the law of the United States into the larger international scheme to be vital to the success of their endeavors. For this reason, *amici* desire to bring to this Court's attention the rule of law that by international consensus governs relations among shippers, agents, other intermediaries, carriers, and vessel owners in the carriage of goods by sea.

Together with the United States, the twelve major commercial maritime jurisdictions represented here have long been focal points for the refinement of the governing law and centers for the resolution of related disputes.

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[2] UNCITRAL made only minor changes to convert the CMI's draft into its own Preliminary Draft Instrument on the Carriage of Goods by Sea, which it published in U.N. Doc. A/CN.9/WG.III/WP.21 (2002). This draft became the basis for the discussions in UNCITRAL's Working Group III (Transport Law), mentioned in the next paragraph of the text.

For the Court's information, more specific biographical information for each of the *amici* is included in the appendix.

SUMMARY OF ARGUMENT

In the twelve major commercial maritime nations represented by *amici*, a transport intermediary[3] acts either as an agent or as a principal — depending on the facts of the case — and no legal rule requires an intermediary to act as an agent when it has not agreed to do so. When an intermediary acts as an "agent" to contract on behalf of its customer, the customer is bound by the contract between the intermediary agent and a third-party carrier, but when the intermediary assumes for itself the carrier's role in a contract with its customer, the customer will not be bound by a contract between that intermediary and another carrier. In *amici's* nations, an intermediary issuing a FIATA FBL would be recognized as a "principal" or "carrier" rather than as an "agent," and the intermediary's customer would not be bound by the contract between that intermediary and another carrier. For the sake of international uniformity, the law of the United States should be the same.

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[3] Because in English, the term "freight forwarder" is sometimes treated as synonymous with "forwarding agent," *see, e.g.*, Leo D'Arcy, Carole Murray, & Barbara Cleave, *Schmitthoff's Export Trade: The Law and Practice of International Trade* 605 n.8 (10th ed. 2000), its use here seems to risk confusion, if not to beg the question that lies at the heart of this case. Moreover, while the *amici* have in common the principles of transport law that they present here, their terminologies nevertheless differ, so that translation of their legal terms (*e.g.*, "*spedizioniere*," "*commissionnaire*," "*expediteur*," "*transitario*") with the term "freight forwarder" risks compounding the semantic problem with a linguistic one. For these reasons, it is convenient to take a cue from the Shipping Act of 1984, and employ in this brief the term "intermediary" to describe the party positioned in the transport chain between the shipper and one or more third parties who, depending on the circumstances, may be an agent or a carrier. *Cf.* 46 U.S.C. § 1702(17) (definition of "ocean transportation intermediary").

ARGUMENT

Petitioner Norfolk Southern argues that respondent Kirby is bound by the contract of carriage that ICC, an Australian intermediary, concluded with Hamburg Süd, an ocean carrier. This argument is based on the theory that because ICC was an intermediary it must have acted as Kirby's agent when it contracted with Hamburg Süd, and that Kirby was accordingly bound as an undisclosed principal.

Throughout the commercial maritime nations of the world, the law is directly contrary to the railroad's position in this case. Although the term "freight forwarder" was once understood in many countries to imply an agency relationship, the industry and the law have both advanced to the point that the law now recognizes the industry's need for freedom of contract and flexibility in structuring transactions. Whether an intermediary is the shipper's agent today depends on the intent of the two contracting parties as indicated by all of the circumstances in each case.

In this case, Kirby contracted only with ICC. They concluded a contract of carriage evidenced by the bill of lading that ICC issued to Kirby, and ICC was the "carrier" — a principal, not an agent — under this contract.

I. IN THE TWELVE MAJOR COMMERCIAL MARITIME NATIONS REPRESENTED BY *AMICI*, AN INTERMEDIARY ACTS *EITHER* AS AN AGENT *OR* AS A PRINCIPAL — DEPENDING ON THE FACTS OF THE CASE — AND NO LEGAL RULE REQUIRES AN INTERMEDIARY TO ACT AS AN AGENT WHEN IT HAS NOT AGREED TO DO SO

Amici are aware of no legal rule in any country that *requires* an intermediary to act as an agent when it has not agreed to do so. Minor differences in approach or terminology should not obscure the underlying uniformity on the basic principle.

A. The Major Common-Law Systems, Applying Familiar Rules of Agency Law, Permit an Intermediary to Act *Either* as an Agent *or* as a Principal

Professor Clive Schmitthoff, one of the twentieth century's leading English experts on the law of international trade, succinctly explained the current role of intermediaries under English law:

> A forwarder may act as a principal or as an agent. Historically, forwarders acted as agents on behalf of their customers [and for this reason they were known as forwarding agents] but the practice has changed and in modern circumstances they often carry out other services .... Often they act as carriers. It follows that, in law, they may qualify more often as principals than as agents. Nevertheless, it has to be ascertained in every individual case in which legal capacity the forwarder acted. The answer depends on the construction of the contract between the forwarder and his customer and the facts of the case.

Clive M. Schmitthoff, *Schmitthoff's Export Trade: The Law and Practice of International Trade* 302 (9th ed. 1989).[4]

Professor Schmitthoff proceeds to discuss some of the factors that might indicate whether a particular intermediary is a carrier or an agent (such as charging either a commission, which would tend to indicate agency, or an "all-in" price, which would tend to indicate that it was acting as a principal), *id.* at 303, but he notes that no one factor is decisive. He concludes that determining

> whether the forwarder has acted as carrier, *i.e.*, as principal, or as forwarding agent ... is always a question of construction of the contract and the facts .... Bean J. expressed this conclusion, when observing

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[4] Professor Schmitthoff's words here and in the quoted passages following have been adopted by the authors of the current edition of his book. *See* D'Arcy, *supra* at 605-06.

> that "at the end of the day it was very much a matter for the trial judge whether forwarding agents were in fact acting as agents or principals."

Id. at 304 (quoting *Hair & Skin Trading Co. v. Norman Airfreight Carriers Ltd.*, [1974] 1 Lloyd's Rep. 443, 445 (Q.B.) (Bean, J.)). *Accord, e.g.*, Francis M.B. Reynolds, *Bowstead and Reynolds on Agency* ¶ 9-024 (17th ed. 2001); Stewart Boyd, Andrew Burrows & David Foxton, *Scrutton on Charterparties and Bills of Lading* 55 n.75 (20th ed. 1996); *Aqualon (UK) Ltd. v. Vallana Shipping Corp.*, [1994] 1 Lloyd's Rep. 669 (Q.B. (Com. Ct.) 1993) (noting that "forwarding agents ... act in very many capacities, including contracting for carriage as principals," and adding "that this is also well understood in the trading environment").

Other common-law countries have followed the example of English law in this regard. The premier Australian treatise on maritime law describes the intermediaries' shift away from their traditional agency role:

> [F]reight forwarders have been held to have contracted as carrier, and not merely as agent, particularly where they provide a "door to door" service involving carriage to and from the port at either end of the sea carriage.

Martin Davies & Anthony Dickie, *Shipping Law* 338 (2d ed. 1995); *see also id.* at 168 (noting that a "forwarder may be acting merely as agent for the cargo-owner" or it "may have contracted with the cargo-owner as principal").

The general position of New Zealand, like that of England and Australia, is that an intermediary may act as an agent or it may assume the liability of a carrier. *See EMI (New Zealand) Ltd. v. William Holyman & Sons Pty Ltd.*, [1976] 2 N.Z.L.R. 566 (H.C.). *See also, e.g., Emery Air Freight Corp v. Nerine Nurseries Ltd.*, [1997] 3 N.Z.L.R. 723, 725 (Henry, J.), 732-33 (Blanchard, J.) (Ct. App.) (holding that a freight forwarder was acting as a carrier rather than merely acting as "a forwarding agent"; explaining that the description "freight forwarder" should not be taken out of context, and was not determinative of legal status as either carrier or agent).

B. In Civil-Law Systems, the Relevant Codes Permit an Intermediary to Act *Either* as an Agent *or* as a Principal

In civil-law countries, the legal framework is somewhat different, and thus the analysis looks not to common-law agency principles but to a tradition descended from Roman law and found in provisions of the relevant codes (typically the Civil Code or the Commercial Code). The substantive results are nevertheless consistent with the conclusions reached by the Eleventh Circuit in the decision below.

1. Under Italian law, for example, a shipper may enter into a contract of carriage with a carrier directly, or else through an intermediary acting as an agent. In this context, the law recognizes not only the traditional form of agent, who acts on the shipper's behalf to procure a contract in the shipper's name with a carrier, but also the "forwarding agent", or "*spedizioniere.*" The forwarding agent acts on the shipper's behalf pursuant to a contract with the shipper, called a "forwarding contract" or "*contratto di spedizione.*" On the shipper's behalf, but in the forwarding agent's own name, the forwarding agent then pursues a second contract, "*contratto di trasporto*", with a carrier. Article 1737 of the Italian Civil Code provides:

> The forwarding contract is an agency (agreement) pursuant to which the freight forwarder undertakes to stipulate, in its own name and for the account of the principal, a contract of carriage and to perform the ancillary operations.

It follows that the general provisions of the Italian Civil Code on agency agreements apply, except where they are superseded by specific provisions in the forwarding contract.

In the particular context of goods transport, the forwarding agent is a variant of the more general term,

"commission agent." The civil law's commission agent has no analog in common law. In civil law, there is an agency relationship between a forwarding agent and the shipper, but the forwarding agent is a principal with respect to the carrier, and the shipper can neither sue the carrier nor be sued by the carrier. *See* Bowstead & Reynolds, *supra* at ¶ 1-020.

In Belgium, such a forwarding agent is called a "*commissionair expediteur*," *see* I Commercial Code Tit. 7 (Belgium), and the forwarding contract is likewise an agency agreement. In the Netherlands, the forwarding agent is an "*expediteur*," and the forwarding contract is also an agency agreement. *See* Civil Code 8:60 (Netherlands).

On the other hand, in Italy (as elsewhere) the intermediary may undertake to perform the carriage with its own means of transport -- or by subcontracting to use the services of others. In this situation, the intermediary assumes all of the obligations of a carrier and article 1741 of the Italian Civil Code applies:

> The freight forwarder who, with its own or others' means, undertakes to perform in whole or in part the transport shall have the obligations and the rights of the carrier.

This undertaking changes the legal nature of the contract between the shipper and the intermediary from "*contratto di spedizione*" (forwarding contract) to "*contratto di trasporto*" (contract of carriage).

Article 1741 is so clear that the proposition is seldom considered by the jurisprudence, but two recent decisions of the Italian Supreme Court (Court of Cassation) confirm this. In *Gondrand SNT v. Gastaldi & C. S.p.A.*, Mar. 6, 1997, n.1994, 1998 *Diritto Marittimo* 394, the Court of Cassation noted that when the shipper and the intermediary agree on a global remuneration, the problem arises of establishing whether the parties intended to conclude a "*contratto di trasporto*" (contract of carriage) or a "*contratto di spedizione*" (forwarding contract). The court held

that when the intermediary undertakes to perform the carriage, it clearly indicates that the parties intended a contract of carriage, rather than a forwarding contract.

In *Società Italiana di Assicurazioni Trasporti SIAT S.p.A. v. Grandi Targhetti Navigazione S.p.A.*, Aug. 13, 1997, n.7556, 1998 *Diritto Marittimo* 406, the Court of Cassation, before taking up the question of whether the particular intermediary had acted as a carrier, stated the following:

> It is advisable to start with the indication of the difference that exists between the contract of carriage and the forwarding contract, such difference consisting in the fact that whilst in the former contract the carrier undertakes to perform the carriage with its own means or with the means of others, taking upon himself all the risks of the performance of the contract, in the latter instead the freight forwarder only undertakes to stipulate with others, in his own name but for the account of his principal, a contract of carriage.

Thus in Italian law, the nature of the contract between shipper and intermediary in each case depends on the intent of the parties. When their intent is not expressed adequately, the court is left to infer it from the facts.

The same is true in the Netherlands. An intermediary may assume the role of carrier as opposed to the role of agent. The former role leads to a contract of carriage as defined in Civil Code 8:20; the latter to a contract for the arranging of carriage as defined in Civil Code 8:60.

In Belgian law, it is also true that an intermediary may assume the role of carrier as opposed to the role of agent. Unlike Dutch law, Belgian law still distinguishes between a nominal carrier and one who actually performs the carriage. While the distinction persists in terminology, it does not translate into a difference at law; the nominal or contracting carrier is at law the equal of the actual carrier. In both Belgium and the Netherlands, whether in a particular case an intermediary has acted as carrier or

agent is a question the courts will decide based on the intent of the parties. *See Gijsbers v. Schiphoff* (Kribbebijter), Hoge Raad, Mar. 11, 1977, 1977 N.J. 521 (Sup. Ct. Netherlands). The question can cut both ways. *See* The Hague Court of Appeal, 14 Sept. 1979, 1979 S. & S. 121 (where a freight forwarder had concluded a contract of carriage in its own name without explicitly mentioning its principal, and the bill of lading named the principal as the shipper, the contract of carriage was between the principal and the carrier) and The Hague Court of Appeal, 17 Dec. 1991, 1992 S. & S. 131 (where a forwarder had concluded a contract of carriage in its own name without explicitly mentioning a principal, facts relating to an earlier, identical shipment proved the carrier knew that the forwarder acted as agent on behalf a named principal, and the custom of forwarders acting on behalf a principal both led the court to conclude that the contract of carriage was made between the named principal and the carrier).

2. The Nordic countries are unanimous on this point. In 1994, Denmark, Finland, Norway, and Sweden enacted virtually identical maritime codes, and they all distinguish a contracting carrier from an actual carrier. A contracting carrier is one who concludes a contract with the shipper. Whether a person performing transport services is acting as an agent or as a carrier is a matter to be determined on a case-by-case basis. When it is not made sufficiently clear in the contract, it may be inferred from various facts, including the pattern or practice of dealings between the parties as well as that in the trade more generally. In the Danish case of *The Flexen*, 1989.123 (Mar. & Commercial Ct.), where the same party had performed several tasks of transport for the same customer but had not clearly assumed the role of agent, it was held to be a carrier. In a case in which the intermediary issued a bill of lading covering not only sea transport but also ancillary land transport, and its sub-contractors issued their own transport documents naming the intermediary as shipper, the Supreme Court of Sweden held the intermediary to be a carrier. *See* 1996 N.J.A. 211.

3. The laws of Japan and Korea are in accord on these matters with those of the European and Nordic jurisdictions with civil-law traditions. Under section 99 of the Japanese Civil Code, an intermediary may, purely as the agent of a shipper, secure a contract between the shipper and a carrier. Alternatively, as a "forwarding agent" under article 559 of the Japanese Commercial Code, an intermediary may make a forwarding contract with the shipper as well as a contract for carriage with a third party. But, the intermediary may also contract on his own, as a carrier, with the shipper, as provided in article 570 of the Japanese Commercial Code.

The same alternatives exist in Korea. An intermediary, acting purely as the agent of a shipper, may secure a contract between the shipper and a carrier. Under article 114 of the Korean Commercial Code, an intermediary acting as a "forwarding agent" may make a forwarding contract with the shipper as well as a contract for carriage with a third party. Finally, article 116(2) of the Korean Commercial Code provides that when an intermediary issues its own bill of lading, it is conclusive evidence that the intermediary acted as a carrier. Although these provisions of the Commercial Code have force only for inland carriage, it is accepted that the same rules apply when an intermediary issues its own bill of lading for the carriage of goods by sea. *See* In Hyeon Kim, *Maritime Law Treatise* 63 (2002); Chang-Joon Kim, *A Study on the Legal Status of a Freight Forwarder* 36 (2004) (unpublished Ph.D. thesis, Kyoung-Yee University); Sang-Hyun Song & Hyun Kim, *Basic Text on Maritime Law in Korea* 209, 239 (1999).

C. Although French Law Analyzes the Situation Somewhat Differently, Using the Concept of the "*Commissionnaire*" (Commission Agent), the Substantive Result is the Same

French law recognizes three categories of intermediaries, as do the systems of many other civil-law countries. But in France only two of them are significant in practice.

In theory, an intermediary may undertake to perform the contract of carriage itself, and the carriage contract would then be binding on the two parties. *See* Code Civil [C. Civ.] art. 1134, al. 1 (Fr.). If the intermediary contracts with another carrier, however, and it is determined that the intent had been for the intermediary to organize the carriage rather than to perform the carriage, then the intermediary will be treated as a "*commissionnaire*" (commission agent) rather than as the carrier.

In practice, therefore, the important question is generally whether an intermediary is a "*transitaire*," corresponding to an intermediary acting as an agent in a common-law country, or a "*commissionnaire*" (commission agent). The former is governed by the articles of the French Civil Code on the agency contract with representation. *See* C. Civ. art. 1984 (Fr.). The latter is an "agency contract with no representation," *see* Commercial Code arts. L. 132-1 to 132-8 (Fr.). The consequences for an intermediary of being a "*commissionnaire*," however, are virtually the same as the consequences of being a carrier. The distinction in French law accordingly has the same practical consequence as the more familiar distinction between agents and principals/carriers.

In sum, the laws of commercial maritime nations throughout the world all agree that an intermediary is not always the agent of the shipper when goods are carried by a third party with whom the intermediary has contracted for carriage. Rather, the intermediary has the discretion to contract as a carrier with the shipper, regardless of whether the contracting carrier then carries or hires another carrier to do so instead. Whether an intermediary has assumed the role of an agent or acts on its own in its contract with the shipper is a matter to be decided everywhere on a case-by-case basis. When the intermediary has declared its role clearly in the shipping documents, that declaration is persuasive, but absent such a declaration or in the event of its ambiguity, all of the circumstances, including other communications, past dealings, and trade practices, are relevant to the determination.[5]

II. WHEN AN INTERMEDIARY ACTS AS AN "AGENT" TO CONTRACT ON BEHALF OF ITS CUSTOMER WITH AN UNDERLYING CARRIER, THE CUSTOMER IS BOUND BY THE CONTRACT THAT IT HAS CONCLUDED — THROUGH THE AGENCY OF THE INTERMEDIARY — WITH THE UNDERLYING CARRIER

In agency law, the agent's ability to bind its principal to a contract is one of the defining features of the relationship. Thus an intermediary acting as an agent binds its customer to the contracts that it has concluded on the customer's behalf. *Amici* do not understand this proposition to be disputed in this case, and the point is so basic that there is no need to dwell on it. Professor Schmitthoff explains the rule under English law:

> If the forwarder acts as the customer's agent, his duty is to procure with due diligence others who perform the carriage, storage, packing or handling of the goods. The customer, through the intermediaryship of the forwarder, enters into direct contractual relations with the others. In this case the forwarder is

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[5] The irreconcilable conflict between an intermediary's duty as an agent to act in the best interest of its principal the shipper on the one hand, and its self interest when it contracts with the shipper as between two principals on the other, *see* Reynolds, *supra* at ¶¶ 1-032, 1-034, leads to the same conclusion in both common law and civil law traditions: that an agent cannot be at once both agent and principal in relation to the same shipper. This is not to say, however, that an intermediary acting as an agent cannot then by contract consent to duties and liabilities apart from those conferred by agency, but that would necessarily depend on the agreement of the parties manifest in that contract. *See, e.g., Cory Brothers Shipping Ltd. v. Baldan Ltd.*, [1997] 2 Lloyds Rep. 58 (Cen. L. Cty. Ct. (B. L.)) (where the bill of lading named its customer as the shipper, a forwarding agent who accepts a quotation naming *it* as the customer also incurred personal liability for the freight).

> under the usual duties of an agent, unless they are modified by his contract with the customer....

Schmitthoff, *supra* at 303. Essentially the same approach is followed in all of the countries represented here. *See, e.g.*, French Civil Code art. 1984; Japanese Civil Code art. 99.

III. WHEN AN INTERMEDIARY ACTS AS A "PRINCIPAL" OR "CARRIER," ITS CUSTOMER WILL NOT BE BOUND BY THE SUBCONTRACT THAT IT CONCLUDES WITH ANOTHER CARRIER

When the intermediary acts as a "principal" or a "carrier," it is now acting for its own account rather than as an agent of its customer. When the intermediary subcontracts its duties under the contract of carriage, therefore, it is contracting for its own account — not binding its customer to its contracts with its suppliers. Once again, there are minor variations in analysis, but substantially the same result is reached in the *amici's* nations as was reached by the Eleventh Circuit in the decision below.

A. In the Major Common-Law Systems, There is no Privity Between a Shipper and Others with Whom an Intermediary Acting as Carrier has Contracted, so the Shipper is not Bound by the Terms of Such Contracts

Professor Schmitthoff once again supplies a concise explanation of English law:

> If the forwarder acts as a principal he enters into a contract of services with the customer. He is the only person with whom the customer is in contractual relations, even though the actual services, which the forwarder has undertaken, are carried out by others....

Schmitthoff, *supra* at 303.

Other common-law countries have continued to follow the example of English law. Professors Davies and Dickie explain the rule in Australia as follows:

> Where the freight forwarder is the contractual carrier, ... [t]he forwarder contracts with both the shipper and the sea-carrier as principal. *The shipper is not a party to the contract between the forwarder and the sea-carrier under the sea-carrier's bill of lading.* Conversely, the sea-carrier is not a party to the contract between the shipper and the forwarder but is merely a sub-contractor of the forwarder.

Davies & Dickie, *supra* at 338; *see also id.* at 168 (explaining that if "the forwarder [has] contracted with the cargo-owner as principal, promising to carry the goods to their final destination, [then] the bill of lading ... contract between the forwarder and sea-carrier is a sub-contract by the freight forwarder as principal, rather than as agent for the cargo-owner").

B. In Civil-Law Countries the Shipper Will not be Bound by the Subcontracts of an Intermediary that has Assumed the Role of Carrier in its Contract with the Shipper

In Italian law, the intermediary who acts in its own name cannot bind the shipper in its subcontracts with others. According to article 1705 of the Italian Civil Code:

> The agent who acts in its own name acquires all rights and assumes all obligations arising out of the contracts entered into with third parties, even if they had knowledge of the agency.
>
> Third parties have no privity of contract with the principal. However the principal may, acting in place of the agent, exercise the rights arising out of the performance of the agency, except where this may adversely affect the rights best owed to the agent by the provisions that follow.

In the Nordic countries, the carrier cannot bind the contracting shipper to another contract, *i.e.*, a subcontract.

In Japan, when an intermediary contracts with the shipper as a carrier, and then subcontracts with a third party to perform the carriage, there is no contractual rela-

tionship between the shipper and the third party. Two contracts independent of each other are the result, and no relationship binds the shipper with the third party. In *Fuji Fire & Marine Insurance Co. v. Mitsubishi Logistics Corporation*, 1008 Hanrei Times 288 (Tokyo D. Ct. June 22, 1999), an NVOC issued a FIATA bill of lading to the shipper and subcontracted with a warehouse for storage pending their loading. While warehoused, the goods were damaged. The shipper's subrogated insurer sued the NVOC and the warehouse. The warehouse sought to rely on an exemption clause in its "Port and Harbor Operation Contract Form," but this was not binding on the shipper because it was not in privity with the warehouse. The court therefore decided the case strictly on tort principles.

In Korea, when the intermediary enters into both a forwarding contract with the shipper and a carriage contract with a third party, the shipper has no claim in contract against the third-party carrier. *See* Case No. 97na17154 (Seoul D. Ct. Oct. 28, 1999).

A recent decision of the Korean Supreme Court confirms that the same result would follow when the intermediary acted as a carrier. *See* Case No. 99da55052 (Sup. Ct. Mar. 18, 2000). An intermediary issued its own bill of lading to the underlying shipper (just as ICC did in the present case), and then obtained the ocean carrier's bill of lading when it subcontracted for the carriage of the goods (just as ICC obtained Hamburg Süd's bill of lading in the present case when it subcontracted with Hamburg Süd). Rather than the usual form, however, the intermediary was listed in the consignor column of the ocean carrier's bill of lading as having acted "on behalf of" the cargo owner. When the goods were damaged during the custody of the ocean carrier, the subrogated cargo insurer sued the ocean carrier and sought to rely on the contract. The Korean Supreme Court rejected this claim. Having issued its own bill of lading to its customer, the intermediary had acted as a carrier. No matter what the ocean carrier's bill of lading said, the intermediary could not act as the cargo owner's agent when it had contracted with the cargo

owner as a principal. Thus there was no binding contract between the cargo owner and the ocean carrier, and the contractual claim against the ocean carrier failed.

C. In France, the Shipper Will not be Bound by the Contracts that a "*Commissionnaire*" (Commission Agent) Concludes with the Underlying Carriers

As explained above, *see supra* at 11-13, the key distinction under French law is not between the intermediary as "carrier" and the intermediary as "agent," but rather between the intermediary as "*commissionnaire*" (commission agent) and the intermediary as a "*transitaire*" under the provisions of the French Civil Code on the agency contract with representation. Thus an intermediary that would qualify as a carrier under another legal system would be a "*commissionnaire*," subject to a carrier's liabilities, in France.

It is well established under French law that the shipper is not bound by the contract that a "*commissionnaire*" concludes with an underlying carrier. For example, if the "*commissionnaire*" has not paid the freight due to the carrier, the carrier is unable to collect from the underlying shipper because there is no contract between them. *See, e.g.*, Cass. com., Dec. 9, 1997, 1998 Bull. Civ. IV, No. 333; Cass. com., Dec. 8, 1998, 1999 Droit Maritime Français 152. Similarly, if the underlying shipper wishes to sue the carrier for damage to the cargo, it must do so in a quasi-tort action; it has no remedy in contract. *See, e.g.*, Cass. com. June 12, 1872, D.P. I, 1872, 216; Cass. com. April 13, 1874, D.P. I, 1876, 255; Rodière, *Traité général de droit maritime*, Dalloz, t. 3, no. 936.

IV. IN *AMICI'S* NATIONS, AN INTERMEDIARY ISSUING A FIATA FBL WOULD BE RECOGNIZED AS A "PRINCIPAL" OR "CARRIER" RATHER THAN AS AN "AGENT," AND THE INTERMEDIARY'S CUSTOMER WOULD NOT BE BOUND BY THE SUBCONTRACT THAT IT CONCLUDES WITH ANOTHER CARRIER

Under the laws of commercial maritime nations throughout the world, the agency or principal status of an intermediary is a matter to be decided on a case-by-case basis in light of all of the circumstances. The Eleventh Circuit, in its decision below, carefully examined factors that would be relevant to making this decision anywhere, and concluded that every factor pointed to the conclusion that ICC had acted as a principal, not an agent, in its dealings with Kirby. In the view of the *amici*, the courts in each of their countries would have reached the same conclusion as the Eleventh Circuit.

First, in the common-law countries, that an intermediary has acted as an agent or as a principal "can only be a matter for interpretation." *Reynolds*, *supra* ¶ 9-024. An excellent summary of the position in all of the common-law countries was published thirty years ago in *Halsbury's Laws of England*:

> The fact that a person describes himself as a forwarding agent is not conclusive; and it is a question of fact to be decided according to the circumstances of each case whether a person normally carrying on business as a forwarding agent contracts solely as agent so as to establish a direct contractual link between his customer and a carrier (or possibly with several carriers, each undertaking a different part of the transit), or whether he contracts as principal to carry the goods, the customer appreciating that he will perform the contract vicariously through the employment of subcontractors. The nature of the carriage, the language used by the parties in describing the role of the person concerned, and any course of dealing between the parties will be relevant factors.

5 *Halsbury's Laws of England* ¶ 442 (4th ed. 1973) (footnotes omitted). The current edition continues to present this as the law of England in substantially the same language. *See* 5(1) *Halsbury's Laws of England* ¶ 575 (4th ed. reissue 1993). This precise passage was adopted by the Supreme Court (now the High Court) of New Zealand as accurately describing New Zealand's law in *EMI (New Zealand) Ltd. v. William Holyman & Sons Pty Ltd.*, [1976] 2 N.Z.L.R. 566, 572-573.

Under Australian law, Professors Davies and Dickey have stressed two indicia of an intermediary's acting as a principal: the fact that an intermediary has "promis[ed] to carry the goods to their final destination," Davies & Dickie, *supra*, at 168, and the intermediary's provision of "a 'door to door' service involving carriage to and from the port at either end of the sea carriage," *id.* at 338. Second, the civil code countries also contain principles that would give due recognition to the FBL as a carrier document, and thus would preclude a finding of partial agency by the intermediary on behalf of the shipper. Under article 1741 of the Italian Civil Code, for example, that result is undeniable because ICC "with its own or others' means, undert[ook] to perform in whole or in part the transport." Similarly, under the laws of both the Netherlands and Japan, the issuer of a FIATA FBL must be a carrier because the particular provisions of that bill pertaining to the freight forwarder's liability for cargo's loss or damage, articles 6.1-6.6, are incompatible with the ordinary responsibility of an agent.

The General Conditions of the Nordic Association of Freight Forwarders (NSAB 2000)[6] are widely used in Scandinavia. According to section 2-A, an intermediary is liable as a carrier when it performs the carriage of goods

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[6] English translation *available at* http://dasp.dk/docs/jura/nsab_2000/nsab2000_uk.asp.

by its own means of transport (performing carrier), or when it has expressly or impliedly accepted liability as carrier (contracting carrier), and an intermediary shall be considered a contracting carrier when it has issued a transport document in its own name or, when marketing or describing its offer, it has formulated its undertaking in such a way (*e.g.*, quoting its own price for the transport) that it can be reasonably assumed that it has undertaken a liability as carrier. All of these factors confirm that ICC acted as a principal in this transaction.

Under article 116(2) of the Korean Commercial Code, ICC would be considered to be unambiguously a "carrier" because it issued its own bill of lading. The Dutch courts likewise have left no doubt that the contract evidenced by a FIATA FBL is a contract of carriage, from which it follows inescapably that the party issuing the FBL must be a carrier. *See* The Hague Court of Appeal, 9-1-1987, 1989 S. & S. 26; *id.* at 28-3-1995, 1996 S. & S. 3. Recent decisions of the Dutch Supreme Court appear to accept this view. In *The Hanjin Oakland*, Hoge Raad 12 September 1997, NJ 1998, 687, for example, the Supreme Court seems to have taken for granted that the non-vessel owning intermediary that issued a FIATA FBL was a carrier and not an agent.

In this case, the key facts are precisely those found with the FBL – an intermediary's agreement to act as a principal to carry the goods.

The law of the United States ought to be the same, in order that the law of the major jurisdictions cooperating in ocean commerce may remain uniform. No subject matter deserves uniformity more than international goods transport. As this Court said in its most recent decision interpreting the Carriage of Goods at Sea Act, "Conflicts in interpretation of the Hague Rules not only destroy aesthetic symmetry in the international legal order, but impose real costs on the commercial system the Rules govern." *Vimar Seguros y Reaseguros, S.A. v. M/V. Sky*

Reefer, 515 U.S. 528, 537, 1995 AMC 1817, 1823-24 (1995).

This Court's decision is likely to have significant repercussions in the international community's understanding of the role of a transport intermediary and the proper construction of the underlying contracts of carriage. A decision affirming the Eleventh Circuit's judgment on Question 1 as presented in the Petition for a Writ of Certiorari would significantly promote efforts to attain the international uniformity that presently exists on this question.

CONCLUSION

The decision of the court of appeals should be affirmed on the agency question.[7]

Respectfully submitted,

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[7] This brief expresses no view on the second question presented, which addresses the proper interpretation of the Himalaya Clause in the bill of lading that is binding on the respondents. Although major commercial nations uniformly agree on the proper answer to the first question presented, and *amici* are pleased to bring this answer to the Court's attention, there is no such universal uniformity on the second question presented. In many countries, the enforcement — even the relevance — of Himalaya Clauses often turns on unique aspects of national law or the mandatory application of international conventions to which the United States is not a party, particularly when the liability of non-maritime parties is at issue.

APPENDIX

The professors a*mici curiae* are:*

Francesco Berlingieri is a former professor of maritime law in the University of Genoa and President *ad honorem* of the Comité Maritime International. Antwerp University and the University of Bologna have both conferred on him the degree of Doctor Honoris Causa. He is also Honorary Professor of International Maritime Law of the IMO International Maritime Law Institute, and has served as Visiting Professor at Tulane University. He is an honorary member of the Order of the British Empire (OBE), the Canadian Bar Association, the British Maritime Law Association, the Association of Average Adjusters, and the Maritime Law Association of the United States. He serves as President of the Italian Association of Maritime Law, editor of CMI Publications, and editor of *Il Diritto Marittimo*. He is the author of a number of books and articles on maritime law in Italian, French and English. He was a member of the Commercial Court Committee of the High Court of Justice in London from 1977 to 1989. Professor Berlingieri chaired the CMI's Subcommittee on Uniformity from 1995 to 1998, and then represented the Maritime Law Association of Italy on the CMI's Subcommittee on Issues of Trade Law when those subcommittees laid the groundwork for the current process by which new rules for the carriage of goods by sea are now being negotiated under the auspices of UNCITRAL. Along with Francis Reynolds, *infra*, he is one of the three principal authors of the draft instrument adopted by UNCITRAL as the basis for those negotiations.

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* The current affiliations of these *amici* are provided for identification purposes only. The views expressed here by the *amici* are not intended as expressions of the views of their affiliated institutions.

board of World Maritime University and a member of the Maritime Arbitration Chamber of Paris and the French Association of Maritime Law. He is the author of *Traité de droit commercial* (with M. Germain), *Cours de droit du commerce international* (with M. Jacquet), and *Contrats civils et commerciaux* (with M. Collart). He serves as the Director of *Juris-Classeur Transports* and is a collaborator of the French review, *Droit maritime français*. He represents France in the UNCITRAL Working Group on Transport Law.

Sarah Derrington teaches maritime law at both undergraduate and post-graduate levels at the University of Queensland. She also teaches International Carriage of Goods in the LL.M. program at the University of Nottingham. She is a Barrister of the Supreme Court of Queensland, Barrister and Solicitor of the Australian Capital Territory, and a Registered Practitioner of the High Court of Australia, practicing shipping law exclusively. She has published in various journals, including Lloyd's Maritime & Commercial Law Quarterly, the Insurance Law Journal, the Journal of Maritime Law and Commerce, the maritime law area of the Laws of Australia and the Butterworth's Supreme Court Forms, Precedents and Pleadings and has written a chapter in The Modern Law of Marine Insurance. She is a member of the Board of Directors of the Maritime Law Association of Australia and New Zealand (MLAANZ) and has represented Australia and New Zealand in the CMI's work on uniform rules for the carriage of goods by sea and in relation to reform of the law of marine insurance.

Ralph B.T. De Wit is a Professor of Law at Brussels University (VUB), where he teaches contract law, transport law and private international law. He is also a practitioner at Antwerp, at the law offices of Van Doosselaere Advocaten. In addition to numerous articles in the Dutch language on the above mentioned subject matters, he is the author of Multimodal Transport, a comparative treatise on carriage of goods in six jurisdictions. He represents International Federation of Freight Forwarders Associations (in French "*Fédération Internationale des Associations de Transitaires et Assimilés*") (FIATA), and is a member of the UNCITRAL Working Group on Transport Law.

Tomotaka Fujita is a Professor of Law at the Graduate Schools of Law and Politics, University of Tokyo, where he teaches commercial law (including maritime and insurance law), corporate law, and law and economics. Since 1996, he has been a delegate of the Japanese Maritime Law Association in the CMI International Subcommittee for Uniformity of the Law of the Carriage of Goods by Sea and Issues of Transport Law. Among his published writings are Towards the Unification of the Law of International Carriage of Goods by Sea: A New Development at UNCITRAL in Jurist, The Future of Conflict of Laws in Maritime Law in the Japanese Yearbook of Private International Law, Recent Movements Toward the Unification of the Law of Carriage of Goods by Sea in the Seikei Law Review, and A New Regime for the Liability and Compensation for the Carriage of Dangerous Goods by Sea: The Adoption of the HNS Convention, in the Seikei Law Review. He represents Japan as a member of the UNCITRAL Working Group on Transport Law.

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Chartered Ship: A Study in Chartering Law, Shipping Dues in Finland, Punitive Damages in the United States, International Aspects with Special Reference to Admiralty, and co-author of New Carriage of Goods by Sea: The Nordic Approach Including Comparisons with Some Other Jurisdictions. He has published numerous articles in several languages on the law of maritime commerce and tort. He is a member of the boards of directors of the Centre for Maritime Studies (a joint venture of the University of Turku, Åbo Akademi University, and the Turku School of Economics and Business Administration) and of the Scandinavian Institute of Maritime Law in Oslo. He has served as a member of the Governmental Committee for the Revision of Rules on Carriage of Goods and Chartering in the Nordic Maritime Codes. He now serves as the President of the Finnish Maritime Law Association and represents Finland as a member of the UNCITRAL Working Group on Transport Law.

In Hyeon Kim, a licensed ship's captain with ten years of sea service, teaches maritime law, civil law, and marine traffic law at Mokpo National Maritime University, and serves as counsel to Choi & Kim, a leading maritime law firm. He is the author of Maritime Law Treatise and Maritime Law, and co-author of the Maritime Section of the Annotated Commercial Law. The subject of his Ph.D. thesis was the legal status of the freight forwarder, and he has published articles on maritime commercial law in the Korea Business Law Review and the Korea Maritime Law Journal. He represents Korea as a member of the Legal Committee of International Maritime Organization and in the UNCITRAL Working Group on Transport Law.

David Morán Bovio is a professor of law at the University of Cádiz, a Founder-member of the Arbitration Tribunal of the Chamber of Commerce of Cádiz (1998), and counsel to the Olivencia-Ballester Abogados law firm. He has spoken and written on the unification of international transport law in various venues since 1987, including the

Max Planck-Institut für ausländisches und internationales Privatrecht and Institut für Seerecht und Seehandelsrecht, as an Alexander von Humboldt research fellow and as a *Deutscher Akademischer Austauchdienst* (DAAD) guest researcher. Since 1994, he has served as Spain's National Correspondent for the Institute for Unification of Private Law in Rome (UNIDROIT). He served as plenipotentiary at the Diplomatic Conference in Vienna in 1999 and as Chairman of UNCITRAL in 1994, and as Vice Chairman of UNCITRAL in both 1993 and 2001, and as chair of working groups in 1993-1994 and 1995-2000. At present, he represents Spain as a member of the UNCITRAL Working Group on Transport Law.

Paul Myburgh teaches maritime law, conflict of laws, and international trade law at the University of Auckland. He is the author of the New Zealand transport law monograph in the International Encyclopaedia of Transport Law, has contributed a chapter to Ocean Bills of Lading: Traditional Forms, Substitutes, and EDI Systems, and has published numerous articles on maritime law in various international journals, including Lloyd's Maritime and Commercial Law Quarterly and the Journal of Maritime Law and Commerce. He is the New Zealand's correspondent for Lloyd's Maritime and Commercial Law Quarterly, *Anuario de Derecho Maritimo* and *Il Diritto Maritimo,* and the Shipping Law editor of the New Zealand Law Review. He also co-edits the New Zealand Business Law Quarterly and serves on the editorial board of the Baltic Maritime Law Quarterly. He is a member of the Maritime Law Association of Australia and New Zealand (MLAANZ) and represented the MLAANZ in the CMI's project to produce new rules for the carriage of goods by sea.

Francis M.B. Reynolds is a Professor of Law Emeritus in the University of Oxford and an Emeritus Fellow of Worcester College, Oxford, where he taught for more than forty years. He is also a Barrister and Honorary Bencher

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Johan Schelin teaches transport law at the University of Uppsala and at the University of Stockholm, where he also directs the Institute of Maritime and Transport Law. He has acted as an arbitrator in several transport law cases, and is the author of Flags of Convenience Vessels and Labour Conditions, Cargo and Compensation, and The Claim for Cargo Damages, as well as of numerous articles on transport law in Swedish and German journals. He represents Sweden as a member of the UNCITRAL Working Group on Transport Law.

Gertjan van der Ziel is a professor of law at Erasmus University in Rotterdam, where he specializes in maritime law. Before joining the academy, he acted for twenty years as general counsel for a major container line. He is the author of numerous articles in English and Dutch on international maritime law subjects, and a collaborator of the Netherlands' leading transport law journal. He is the President of the Netherlands' Maritime and Transport Law Association and Titular Member of the CMI, as well as a past Board Member of the Netherlands Trade Law

Association. He has represented the Netherlands at both the United Nations Conference on Trade and Development and the United Nations Commission for Europe in discussions pertaining to international maritime and intermodal trade, as well as at diplomatic conferences at which the 1974 Athens Convention relating to the Carriage of Passengers and Their Luggage by Sea and the 1976 London Convention on Limitation of Liability for Maritime Claims were concluded. More recently, he served as one of the three drafters producing for the CMI the draft instrument on transport law adopted by UNCITRAL. He now represents the Netherlands in the UNCITRAL Working Group on Transport Law.